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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
10 AT TACOMA

11 JONATHAN W. McKINNEY

12 Plaintiff,

13 v.

14 JOHN MILLS, *et al.*,

15 Defendants.

Case No. C08-5720 BHS/KLS

ORDER TO SHOW CAUSE

16 This matter has been referred to Magistrate Judge Karen L. Strombom pursuant to 28 U.S.C. §
17 636(b)(1), Local Rules MJR 3 and 4, and Federal Rule of Civil Procedure 72. The case is before the
18 Court upon review of Plaintiff's Complaint. After reviewing the Complaint and balance of the record, the
19 Court orders that the Plaintiff file an amended complaint as he has failed to state a claim under Section
20 1983. The Court offers the following guidance.

21 **I. DISCUSSION**

22 A complaint is frivolous when it has no arguable basis in law or fact. *Franklin v. Murphy*, 745
23 F.2d 1221, 1228 (9th Cir. 1984). When a complaint is frivolous, fails to state a claim, or contains a
24 complete defense to the action on its face, the court may dismiss an *in forma pauperis* complaint before
25 service of process under 28 U.S.C. § 1915(d). *Noll v. Carlson*, 809 F.2d 1446, 1448 (9th Cir. 1987) (*citing*
26 *Franklin v. Murphy*, 745 F.2d 1221, 1227 (9th Cir. 1984)).

27 To state a claim under 42 U.S.C. § 1983, a complaint must allege that the conduct complained of
28 was committed by a person acting under color of state law and that the conduct deprived a person of a

1 right, privilege, or immunity secured by the Constitution or laws of the United States. *Parratt v. Taylor*,
2 451 U.S. 527, 535 (1981), *overruled on other grounds*, *Daniels v. Williams*, 474 U.S. 327 (1986). Section
3 1983 is the appropriate avenue to remedy an alleged wrong only if both of these elements are present.
4 *Haygood v. Younger*, 769 F.2d 1350, 1354 (9th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986).

5 Plaintiff alleges that Defendant Mills “smacked” him in the back of his head. Dkt. # 1-2, p. 3. An
6 allegation of an isolated incident in which a prison guard uses force against a prisoner does not constitute
7 cruel and unusual punishment in violation of the Eighth Amendment. *See Hoptowit v. Ray*, 682 F.2d
8 1237, 1249-50 (9th Cir.1982) (a pattern or practice of physical brutality and harassment by prison guards
9 constitutes cruel and unusual punishment); *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir.), *cert. denied*,
10 414 U.S. 1033 (1973) (“not every push or shove, even if it may later seem unnecessary in the peace of a
11 judge's chambers, violates a prisoner's constitutional rights”).

12 Plaintiff must also allege facts showing how individually named defendants caused or personally
13 participated in causing the harm alleged in the complaint. *Arnold v. IBM*, 637 F.2d 1350, 1355 (9th Cir.
14 1981). A defendant cannot be held liable under 42 U.S.C. § 1983 solely on the basis of supervisory
15 responsibility or position. *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 694 n.58
16 (1978). A theory of *respondeat superior* is not sufficient to state a § 1983 claim. *Padway v. Palches*, 665
17 F.2d 965 (9th Cir. 1982).

18 Under 42 U.S.C. § 1983, claims can only be brought against people who personally participated in
19 causing the alleged deprivation of a right. *Arnold v. IBM*, 637 F.2d 1350, 1355 (9th Cir. 1981). Neither a
20 State nor its officials acting in their official capacities are “persons” under section 1983. *Will v. Michigan*
21 *Dept. of State Police*, 491 U.S. 58, 71 (1989).

22 Plaintiff names Rob Masko, Chief of Corrections and alleges that Mr. Masko is “directly
23 responsible for the actions of all Pierce County Jail Staff.” Dkt. # 1-2, p. 3. This is not, however,
24 sufficient to state a claim under 42 U.S.C. § 1983. Plaintiff must set forth facts describing when, where
25 and how Mr. Masko deprived him of a constitutional right, as Mr. Masko cannot be sued merely in his
26 supervisory capacity.

27 Due to the deficiencies described above, the Court will not serve the amended complaint. Plaintiff
28 shall file an amended complaint curing, if possible, the above noted deficiencies, or show cause

1 explaining why this matter should not be dismissed **no later than January 9, 2009**. If Plaintiff files an
2 amended complaint under § 1983, the amended complaint shall consist of a **short and plain statement**
3 showing that he is entitled to relief. Plaintiff shall allege with specificity the following:

- 4 (1) the names of the persons who caused or personally participated in causing the
5 alleged deprivation of his constitutional rights;
- 6 (2) The dates on which the conduct of each Defendant allegedly took place; and
- 7 (3) the specific conduct or action Plaintiff alleges is unconstitutional.

8 Plaintiff shall set forth his factual allegations in separately numbered paragraphs and shall attach
9 only those exhibits relevant to the factual allegations contained within the amended complaint.

10 Plaintiff is further advised that this amended pleading will operate as a complete substitute for
11 (rather than a mere supplement to) the present complaint. Plaintiff shall present his complaint on the form
12 provided by the Court. The amended complaint must be legibly rewritten or retyped in its entirety, it
13 should be an original and not a copy, it may not incorporate any part of the original complaint by
14 reference, and **it must be clearly labeled the “First Amended Complaint” and Cause Number C08-**
15 **5720BHS/KLS must be written in the caption**. Plaintiff must submit a copy of the “First Amended
16 Complaint” for service on each named defendant.

17 **Plaintiff is cautioned that if he fails to show cause or amend his complaint by January 9,**
18 **2009, the Court will recommend dismissal of this action as frivolous pursuant to 28 U.S.C. § 1915**
19 **and such dismissal will count as a “strike” under 28 U.S.C. § 1915(g).**

20 The Clerk is directed to send Plaintiff the appropriate forms that he may file an amended
21 complaint. The Clerk is further directed to send a copy of this Order and a copy of the General Order to
22 Plaintiff.

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24 Dated this 12th day of December, 2008.

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27 Karen L. Strombom
28 United States Magistrate Judge